

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JAMES EARL WHITE,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security,
Defendant.

)
) No. CV-07-374-CI
)
) ORDER DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND GRANTING DEFENDANT'S
) MOTION FOR SUMMARY JUDGMENT
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BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 14, 17.) Attorney Lora Lee Stover represents plaintiff James Earl White (Plaintiff); Special Assistant United States Attorney Thomas Elsberry represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

On March 31, 2004, Plaintiff protectively filed for Social Security benefits. (Tr. 94, 590.) He alleged disability due to lower back injuries, shoulder problems and neck pain, with an alleged onset date of January 1, 1998, as amended at the administrative hearing. (Tr. 62, 82, 629.) Benefits were denied

1 initially and on reconsideration. (Tr. 59, 600.) Plaintiff
2 requested a hearing before an administrative law judge (ALJ). A
3 hearing was held on March 6, 2007, before ALJ Richard Say. (Tr.
4 625-63.) Plaintiff, who was represented by counsel, and vocational
5 expert Tom Moreland testified. The ALJ denied benefits and the
6 Appeals Council denied review. (Tr. 8-11.) The instant matter is
7 before this court pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript
10 of proceedings and are briefly summarized here. At the time of the
11 hearing, Plaintiff was 35 years old and single. (Tr. 631.) He
12 testified he had a high-school degree and two years of college. He
13 lived with his mother in her trailer. (Tr. 632.) Plaintiff had
14 past work experience as a sales representative and a ticket taker.
15 (Tr. 654-55.) He testified he could not work due to problems with
16 his shoulder, arm, neck and back. He stated his condition was
17 worsening, and he had been taking depression medication since 2006.
18 He testified he could take care of his personal needs, did dishes,
19 and laundry, shopped and drove when he was not on medication. He
20 spent his day watching television for about two hours, reading,
21 visiting friends and his daughter, and playing with his dog. (Tr.
22 632-38.) Some days he attended a football game. (Tr. 649.) He
23 stated he could not lift more than ten pounds, and could sit for
24 five to ten minutes before he had to move around, stand for five
25 minutes, walk for ten minutes and climb a couple of flights of
26 stairs. (Tr. 639-41.) He testified he could only be active for
27 five to fifteen minutes. (Tr. 650.)

ADMINISTRATIVE DECISION

The ALJ found Plaintiff met insured status requirements for disability benefits through September 30, 2000. At step one of the sequential evaluation process, ALJ Say found Plaintiff had not engaged in substantial gainful activity during the relevant time. (Tr. 24.) At step two, the ALJ gave a thorough and detailed summary of the medical evidence and found Plaintiff had the severe impairments of "thoracic outlet syndrome status post surgery, times two, spine problems, left ankle deformity, left AC joint arthrosis status post surgery, and depression and anxiety." (*Id.*) At step three, he determined the impairments, alone or in combination with other impairments, did not meet or medically equal one of the listed impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4 (Listings). (Tr. 32.) The ALJ found Plaintiff's allegations regarding symptoms and limitations were not totally credible. (Tr. 34.) At step four, he determined Plaintiff had a residual functional capacity (RFC) for light work with several postural limitations. Further, he found Plaintiff would need to change positions from time to time, and was limited to work with "short and simple instructions and superficial interaction with coworkers and the general public." (Tr. 32-33.) After consideration of vocational expert testimony and other evidence, the ALJ concluded Plaintiff could perform his past work as a ticket taker. (Tr. 35.) In alternative step five findings based on vocational expert testimony, the ALJ found there were sedentary jobs in the national economy that Plaintiff could perform, such as cashier or assembly worker. (Tr. 35.) He concluded Plaintiff was not disabled as

1 defined by the Social Security Act. (Tr. 22.)

2 STANDARD OF REVIEW

3 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
4 court set out the standard of review:

5 A district court's order upholding the Commissioner's
6 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
7 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
8 Commissioner may be reversed only if it is not supported
9 by substantial evidence or if it is based on legal error.
10 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
11 Substantial evidence is defined as being more than a mere
12 scintilla, but less than a preponderance. *Id.* at 1098.
13 Put another way, substantial evidence is such relevant
14 evidence as a reasonable mind might accept as adequate to
15 support a conclusion. *Richardson v. Perales*, 402 U.S.
16 389, 401 (1971). If the evidence is susceptible to more
17 than one rational interpretation, the court may not
18 substitute its judgment for that of the Commissioner.
19 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
20 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

21 The ALJ is responsible for determining credibility,
22 resolving conflicts in medical testimony, and resolving
23 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
24 Cir. 1995). The ALJ's determinations of law are reviewed
25 *de novo*, although deference is owed to a reasonable
26 construction of the applicable statutes. *McNatt v. Apfel*,
27 201 F.3d 1084, 1087 (9th Cir. 2000).

28 SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
requirements necessary to establish disability:

Under the Social Security Act, individuals who are
"under a disability" are eligible to receive benefits. 42
U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
medically determinable physical or mental impairment"
which prevents one from engaging "in any substantial
gainful activity" and is expected to result in death or
last "for a continuous period of not less than 12 months."
42 U.S.C. § 423(d)(1)(A). Such an impairment must result
from "anatomical, physiological, or psychological
abnormalities which are demonstrable by medically
acceptable clinical and laboratory diagnostic techniques."
42 U.S.C. § 423(d)(3). The Act also provides that a
claimant will be eligible for benefits only if his
impairments "are of such severity that he is not only

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

ISSUES

ORDER DENYING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND
GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT - 5

1 ALJ erred when he: (1) improperly assessed Plaintiff's residual
2 functional capacity; (2) rejected the opinions of treating
3 physicians; and (3) found Plaintiff was not credible. (Ct. Rec. 15
4 at 13-15.)

5 DISCUSSION

6 A. Credibility

7 At step four of the sequential evaluation, ALJ Say found
8 Plaintiff's "subjective complaints regarding the extent of his
9 functional limitations are not fully credible." (Tr. 34.)
10 Plaintiff argues the record does not support the ALJ's credibility
11 assessment. (Ct. Rec. 15 at 15-16.)

12 When an ALJ finds the claimant's testimony as to the severity
13 of pain and limitations due to impairments is unreliable, the ALJ
14 must make a credibility determination with findings sufficiently
15 specific to permit the court to conclude the ALJ did not arbitrarily
16 discredit claimant's testimony. *Thomas v. Barnhart*, 278 F.3d 947,
17 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
18 (9th Cir. 1991). While the ALJ cannot disregard a claimant's
19 subjective complaints regarding the severity of his or her symptoms
20 solely because there is a lack of objective medical evidence to
21 support the testimony, there must be some objective medical evidence
22 of an impairment for the time at issue. However, the lack of
23 objective medical evidence is just one factor considered by the
24 Commissioner. *Bunnell*, 947 F.2d at 346. Once there is evidence of
25 a medically determinable impairment likely to cause an alleged
26 symptom, the ALJ must provide specific and cogent reasons for
27 rejecting a claimant's subjective complaints. (*Id.*) In the absence
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1 of affirmative evidence of malingering, the ALJ's reasons must be
2 "clear and convincing." *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036
3 (9th Cir. 2007); *Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th Cir.
4 2001); *Morgan*, 169 F.3d at 599. The ALJ "must specifically identify
5 the testimony she or he finds not to be credible and must explain
6 what evidence undermines the testimony." *Holohan v. Massanari*, 246
7 F.3d 1195, 1208 (9th Cir. 2001)(citation omitted).

8 In addition to the "ordinary techniques of credibility
9 evaluation," the following factors may be considered: (1) the
10 claimant's reputation for truthfulness; (2) inconsistencies in the
11 claimant's testimony or between his testimony and her conduct; (3)
12 claimant's daily living activities; (4) claimant's work record; and
13 (5) testimony from physicians or third parties concerning the
14 nature, severity, and effect of claimant's condition. *Tommasetti v.*
15 *Astrue*, 533 F.3d 1035, 1039 (9th Cir. 2008); *Thomas*, 278 F.3d at 958.

16 Here, there is no affirmative evidence of malingering; thus,
17 the ALJ's credibility determination must be supported by "clear and
18 convincing" reasons. In his credibility findings, ALJ Say first
19 reasoned that medical evidence indicated negative findings both on
20 examination and in imaging and objective testing. Specifically, he
21 noted medical sources reported "negative neurological findings,
22 normal gait, normal strength, normal sensation, and normal muscle
23 bulk and tone" in Plaintiff's physical condition. (Tr. 34.) In
24 addition to the medical evidence, the ALJ specifically identified
25 other factors that impugn Plaintiff's credibility regarding
26 limitations due to pain. He specifically found Plaintiff failed to
27 comply with prescribed physical therapy treatment, even though all
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1 of the specialists reported this was the only alternative for
2 relief. He also found treating and examining physicians opined
3 Plaintiff was capable of light or sedentary work and psychological
4 evaluations indicated over-reporting of symptoms. *Id.* These
5 reasons are "clear and convincing" and supported by the record.
6 (*See, e.g.,* Tr. 206-07, 211, 213, 222, 224, 311, 355, 358, 421, 433,
7 443, 523.)

8 Further, in his detailed summary of the evidence, the ALJ
9 referenced the opinion of treating specialist Scott Redman, M.D.,
10 that Plaintiff's pain "was a rehab issue" and repeatedly prescribed
11 physical therapy. (Tr. 30, 386.) Plaintiff's unexplained failure to
12 follow treatment recommendations of medical specialists is a
13 permissible reason for discounting Plaintiff's testimony.
14 *Tommasetti*, 533 F.3d at 1039 (claimant's failure to pursue
15 aggressive conservative treatment is valid reason to discount
16 credibility); *Fair*, 885 F.2d at 603 (unexplained, or inadequately
17 explained, failure to follow a prescribed course of treatment may
18 negatively affect a claimant's credibility determination). Dr.
19 Redman also opined Plaintiff's physical condition did not explain
20 the degree of pain reported in his AC joints. (Tr. 31, 537.) The
21 ALJ also noted that examining physical medicine specialist Larry
22 Lamb, M.D., after reporting negative MRI and bone scan results,
23 observed Plaintiff "runs a risk of being over-treated" and commented
24 he was unsure why Plaintiff "seems to regard himself as disabled."
25 (Tr. 30, 518-20.)

26 Other ALJ findings support the credibility determination: in
27 2007, examining psychologist Scott Mabee, Ph.D., reported
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1 Plaintiff's daily activities included caring for his personal needs
2 and household chores and his dog, helping his mother shop and
3 visiting friends and his girlfriend. Plaintiff's report to Dr.
4 Mabee is substantially consistent with activities reported in
5 earlier psychological examinations. (Tr. 26, 28-29, 203-04, 220,
6 316, 372.) The ALJ also found neurology specialist, Dr. William
7 Bronson, reported no pathology to account for complaints of chronic
8 pain, and prescribed aggressive physical therapy. (Tr. 34, 208.)
9 These third-party medical source observations significantly erode
10 Plaintiff's credibility. *Thomas*, 278 F.3d at 959. The ALJ gave
11 legally sufficient reasons for discounting Plaintiff's subjective
12 complaints of disabling pain and limitations.

13 **B. Evaluation of Treating Medical Source Opinions**

14 Plaintiff argues "the ALJ failed to accord proper weight to the
15 opinions of treating physicians." (Ct. Rec. 15 at 14.) However, he
16 does not he treating physician opinions that were improperly
17 rejected. A treating physician is defined in the Regulations as a
18 claimant's own physician (who is also an acceptable medical source)
19 who has a frequent, consistent treatment relationship with the
20 claimant and who has seen the claimant for treatment or evaluation
21 required by a medical condition. 20 C.F.R. §§ 404.1502, 416.902.
22 An examining physician is an acceptable medical source seen to
23 obtain a report to support a disability claim. A treating
24 physician's opinion is generally given more weight than that of an
25 examining physician because of the ongoing nature of the
26 relationship. A treating or examining physician's opinion is given
27 more weight than that of a non-examining physician. *Benecke v.*
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1 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004). If the treating
2 physician's opinions are not contradicted, they must be rejected by
3 the decision-maker with "clear and convincing" reasons. *Lester v.*
4 *Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If contradicted, the ALJ
5 may reject the opinion with specific, legitimate reasons that are
6 supported by substantial evidence. See *Flaten v. Secretary of*
7 *Health and Human Serv.*, 44 F.3d 1453, 1463 (9th Cir. 1995).

8 Historically, the courts have recognized conflicting medical
9 evidence, the absence of regular medical treatment during the
10 alleged period of disability, and the lack of medical support for
11 doctors' reports based substantially on a claimant's subjective
12 complaints of pain as specific, legitimate reasons for disregarding
13 the treating physician's opinion. *Flaten*, 44 F.3d at 1463-64; *Fair*
14 *v. Bowen*, 885 F.2d 597, 604 (9th Cir 1989). The ALJ need not accept
15 a treating source opinion that is "brief, conclusory and
16 inadequately supported by clinical findings." *Lingenfelter*, 504
17 F.3d at 1044-45 (*citing Thomas*, 278 F.3d at 957). Where an ALJ
18 determines a treating physician's stated opinion is materially
19 inconsistent with the physician's own treatment notes, legitimate
20 grounds exist for considering the purpose for which the doctor's
21 report was obtained and for rejecting the inconsistent, unsupported
22 opinion. *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir. 1996).
23 "Although a treating physician's opinion is generally afforded the
24 greatest weight in a disability cases, it is not binding on an ALJ
25 with respect to the existence of an impairment or the ultimate
26 determination of disability." *Batson v. Commissioner of Social*
27 *Security Administration*, 359 F.3d 1190, 1195 (9th Cir. 2004) (*quoting*

1 *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9th Cir. 2001). In
2 assessing the medical evidence, the ALJ properly may consider a
3 claimant's credibility when there are conflicting medical opinions.
4 *Webb v. Barnhart*, 433 F.3d 683, 688 (9th Cir. 2005).

5 Here, the extensive medical record includes reports and
6 progress notes from treating physician William Stime, M.D., and
7 treating orthopaedic specialist D. Scott Redman, M.D. (Tr. 347-58,
8 384-89, 404-22, 521-41, 556-74), as well as evaluations from
9 examining physicians and psychologist, and non-examining agency
10 physicians. The medical evidence spans a period from 2003 until
11 2007.¹ With the exception of a physical evaluation form completed
12 by Dr. Stime on February 27, 2007, (Tr. 567-74) Plaintiff's
13 physicians opined Plaintiff was capable of light to sedentary work.²
14 (Tr. 355, 358, 522, 565.) Because there are contradictory opinions
15 in the record, Dr. Stime's 2007 Medical Source Statement does not
16 merit controlling weight. (Tr. 571-74.) Further, in Dr. Stime's
17 2007 evaluation form, he stated Plaintiff would "probably rate at

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19 ¹ Although Plaintiff alleged an onset date of January 1, 1998,
20 (Tr. 629), he has not submitted medical evidence to support a claim
21 of disability prior to 2003. Earlier records cover the period from
22 1988 through 1993 (with the exception of one emergency room report,
23 dated March 30, 1998, following Plaintiff's injury in a motor
24 vehicle accident). (Tr. 3, 127-40, 173.)

25 ² Orthopaedic specialist Dr. Vanderwilde, opined Plaintiff
26 could do light to sedentary work. (Tr. 358.) The opinions of
27 specialists are given more weight than physicians who do not have
28 the relevant speciality. 20 C.F.R. §§ 404.1527(d)(5); 416.927(d)(5).

1 severely [limited] because of failure at recent job tries," rather
2 than reference a medical condition that would render Plaintiff
3 incapable of performing any work. (Tr. 569.) The ALJ legitimately
4 rejected this opinion because it was based on Plaintiff's unreliable
5 self-report and was not consistent with the rest of Dr. Stime's
6 records. (Tr. 34.) *Flaten*, 44 F.3d at 1463-64.

7 Other medical sources relied upon by Plaintiff appear to be
8 examining physicians or psychologists. Regarding Dr. Figueroa's
9 opinions, the ALJ evaluated the physician's records by summarizing
10 the findings. (Tr. 26.) The record does not establish that Dr.
11 Figueroa was a treating physician when he opined Plaintiff could not
12 work in October 2003 (before Plaintiff had corrective surgery) and
13 in April 2004. (Tr. 152, 186.) The record does not include notes
14 or reports from Dr. Figueroa to support his opinion, and there is no
15 evidence that Plaintiff met the duration requirement for the
16 condition assessed by Dr. Figueroa. 20 C.F.R. §§ 404.1505, 416.905;
17 *Social Security Ruling (SSR)* 82-52. The ALJ was not obliged to
18 accept Dr. Figueroa's brief, conclusory opinions. *Lingenfelter*, 504
19 F.3d at 1044-45.

20 Further, under the case law, a court can read from the ALJ's
21 summary of the evidence and draw inferences relative to medical
22 findings. *Magallanes v. Bowen*, 881 F.2d 747, 755 (9th Cir. 1989).
23 The ALJ's discussion of conflicting opinions from Plaintiff's
24 treating physician and the specialists support the ALJ's rejection
25 of Dr. Figueroa's conclusory opinions. As noted by the ALJ, after
26 surgery, Dr. Stime and examining specialists consistently prescribed
27 aggressive physical therapy and opined he could do light and/or

1 sedentary work. (Tr. 30-31.) The ALJ gave specific and legitimate
2 reasons for rejecting unsupported medical source opinions that were
3 inconsistent with treating and examining physicians records
4 indicating Plaintiff could do light and/or sedentary work.

5 **C. Residual Functional Capacity Assessment**

6 Plaintiff specifically argues the ALJ erred in his RFC
7 determination because he failed to include limitations assessed by
8 non-examining psychologist John McRae, Ph.D., and examining
9 psychologist Robert Quackenbush, Ph.D., in the final RFC findings.
10 (Ct. Rec. 15 at 14; Tr. 314-18, 319-21.) He contends those opinions
11 should have been included or rejected by "clear and convincing"
12 evidence. (Ct. Rec. 15 at 15.)

13 It is well-settled that the ALJ is "responsible for determining
14 credibility, resolving conflicts in medical testimony and for
15 resolving ambiguities," in disability proceedings. *Richardson*, 402
16 U.S. at 400; *Andrews*, 53 F.3d at 1039; SSR 96-8p. The final
17 determination regarding a claimant's ability to perform basic work
18 is the sole responsibility of the Commissioner. 20 C.F.R. §
19 416.946; SSR 96-5p (RFC assessment is an administrative finding of
20 fact reserved to the Commissioner). No special significance is
21 given to a medical source opinion on issues reserved to the
22 Commissioner. 20 C.F.R. §§ 404.1527(e), 416.927(e). Further, where
23 the ALJ's determination is a rational interpretation of the
24 evidence, the court will not substitute its judgment for that of the
25 Commissioner. *Tackett*, 180 F.3d at 1097.

26 Here, after considering the medical evidence and credibility
27 factors, the ALJ found Plaintiff had the RFC to perform light
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1 exertion with the following limitations:

2 He can occasionally climb stairs or ramps, but should
3 avoid climbing ladders, ropes, and scaffolds. He can
4 occasionally engage in stooping, crouching, crawling,
5 kneeling, and balancing. He can occasionally reach
6 overhead. He is capable of understanding, remembering,
7 and carrying out short and simple instructions and
8 superficial interaction with coworkers and the general
9 public. He would find it necessary to change positions
10 from time to time. Although he takes medication for
11 relief of mild to chronic pain and other symptoms, he
12 would be able to remain reasonably alert, attentive, and
13 responsive to perform required job functions.

14 (Tr. 32-33.)

15 An independent review of the medical evidence shows that Dr.
16 Quackenbush's narrative findings of no marked problems with
17 attention, persistence or pace, and mild limitations caused by
18 anxiety and pain are consistent with other psychological evaluations
19 and the ALJ's RFC findings. (Tr. 317-18.) Dr. Quackenbush
20 indicated a "fair to good" prognosis for Plaintiff with no marked
21 cognitive problems. (Tr. 317.) It is noted the ALJ specifically
22 addressed psychological limitations identified by Dr. Quackenbush,
23 including Plaintiff's limited social competence, by including a
24 limitation of "short and simple instructions and superficial
25 interaction with coworkers and the general public." (Tr. 33, 317-
26 18.)

27 Regarding Dr. McRae's Mental RFC, (Tr. 319-35), the narrative
28 conclusions are consistent with Dr. Quackenbush's report and the
ALJ's RFC. (Tr. 321, 335.) The ALJ did not err in giving more
weight to these findings than the accompanying check box opinions.
Murray v. Heckler, 722 F.2d 499, 501 (9th Cir. 1983). Specifically,
Dr. McRae found Plaintiff was able to "follow positive goals

1 established by others;" perform simple work, with some detail;
2 engage in brief transactions with co-workers and the general public;
3 and reason and make judgments with average intelligence." (Tr.
4 321.) He also noted mild limitations caused by depression and/or
5 anxiety. (*Id.*)

6 The hypothetical presented to the vocational expert at hearing
7 included the final RFC limitations, and those limitations are
8 supported by substantial evidence. (Tr. 657.) Therefore, the ALJ
9 did not err in relying on vocation expert testimony that Plaintiff
10 could perform his past work as a ticket taker.³ *Magallanes*, 881 F.2d
11 at 756.

12 CONCLUSION

13 The ALJ thoroughly detailed the medical evidence in the record
14 and properly evaluated the medical opinions in considering
15 Plaintiff's ability to perform work-related activities. The
16 evidence reasonably supports the ALJ's evaluation and rejection of
17 Dr. Stime's conclusory opinion that Plaintiff was unable to do any
18 type of work. The ALJ's credibility determination is legally

19 _____
20 ³ A claimed error at step four would be harmless since the ALJ
21 also made alternative step five findings, based on vocational expert
22 testimony and substantial evidence in the record, that there were
23 sedentary jobs in the national economy, such as cashier and assembly
24 worker, that Plaintiff could perform. (Tr. 35, 659-60.) *Curry v.*
25 *Sullivan*, 925 F.2d 1127, 1129 (9th Cir. 1991); see also *Johnson v.*
26 *Shalala*, 60 F.3d 1428, 1436 n.9 (9th Cir. 1995). As discussed in the
27 body of this decision, there is substantial evidence that Plaintiff
28 retained the ability to do sedentary work.

1 sufficient and fully supported by the record in its entirety. His
2 determination of non-disability is based on substantial evidence and
3 free of legal error. Accordingly,

4 **IT IS ORDERED:**

5 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is
6 **DENIED;**

7 2. Defendant's Motion for Summary Judgment (**Ct. Rec. 17**) is
8 **GRANTED;**

9 The District Court Executive is directed to file this Order and
10 provide a copy to counsel for Plaintiff and Defendant. Judgment
11 shall be entered for Defendant, and the file shall be **CLOSED**.

12 DATED December 10, 2008.

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14 S/ CYNTHIA IMBROGNO
15 UNITED STATES MAGISTRATE JUDGE
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